



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 209 OF 2009

**IN THE MATTER OF THE ESTATE OF JOSEPH WANJOHI KIGOME (DECEASED)
THROUGH**

**ESTHER WANGARE WANJOHI 1ST PETITIONER (DECEASED)
JANE GATHONI WANJOHI 2ND PETITIONER
PHYLLIS WANJOHI KIGUMI 3RD PETITIONER**

RULING

I have before me two applications for consideration. The first application is dated 30th March, 2011, and is by **Francis Kinyanjui Mwangi** and **Samwel Kamau Mwangi**, hereinafter (“**the applicants**”) and they seek to be appointed administrators to the estate of the late **Joseph Wanjohi Kigome** in place of **Esther Wangare Wanjohi** who died on 9th March, 2011. The main grounds for the application are that the said **Esther Wangare** was one of the administrators of the estate of the late **Joseph Wanjohi Kigome** and she died before the issue of distribution had fully been determined; that she had her own property which was included in the assets of her husband, the late **Joseph Wanjohi Kigome** and that the applicants, as brother and nephew of the said **Esther Wangare Wanjohi**, are the proper persons to administer the remainder of the estate. The application is supported by an affidavit sworn by the applicants in which the said grounds are elaborated.

The application is opposed by **Jane Gathoni Wanjohi** and **Phyllis Wanjiru Kigumi**, (hereinafter “**the surviving petitioners**”). In this regard, there is a replying affidavit sworn by the 1st surviving petitioner. It is deponed in the affidavit, *inter alia*, that **Joseph Wanjohi Kigome**, (the deceased) was survived by the late **Esther Wangare Wanjohi**, the deponent and the surviving petitioners; that he died testate and his estate is to be administered in accordance with his will; that the applicants are not his dependants; that the late **Esther Wangare** only had a life interest in the estate of her husband the late **Joseph Wanjohi Kigome**, and on her demise, the properties reverted to the deceased estate; that the properties, Pioneer/Langas I (Malel).43 and Motor Vehicle registration number KWJ 005, formed part of the deceased’s estate; that the applicants are strangers to the estate of the deceased and their application is made in bad faith.

The second application is by the surviving petitioners who seek the following main orders of the court:-

(i) A preservative order in lemine forbidding transfer, dealing, sale, charging, wasting possessing or otherwise taking possession of the said properties and the documents thereof or otherwise interfering with the administration of the estate or in any way hindering the applicants from effectively carrying out their duties as administrators of the estate of the deceased herein subject only to the certificate of confirmation of grant; that is:-

- (a) Pioneer/Langas Block I (Malel) 182,
- (b) Unregistered ¼ plot in Relax-In Langas,
- (c) Land Parcel number Pioneer/Langas/Block I (Malel) 43.

(i) The Court do order that the deceased's motor vehicle registration number KWJ 005 be impounded by Court bailiffs or auctioneers and be kept at Langas Police Station pending the hearing and determination of this application and thereafter be placed in the custody of the administrators subject to the certificate of confirmation of grant.

(ii) That the following properties: motor vehicle registration number KWJ 005 and Land Parcel number Pioneer/Langas Block (Malel) 43, do revert to the estate and remain in the estate and the names **Esther Wangare Wanjohi** be deleted in the relevant registers and in lieu thereof, the name of the deceased be restored pending the execution of the certificate of confirmation of grant and the said properties do devolve to the rightful heirs/residuary legatees named in the will.

(iii) That the interested party be restrained from barring the administrators from collecting rent from the properties as set out in form 3: Land parcel No. Pioneer/Langas Block I (Malel) 43, Land Parcel No. Pioneer/Langas Block I (Malel) 182 and unregistered parcel of land in Relax-Inn Langas measuring ¼ of an acre.

(iv) That pursuant to section 36 (1) of the Law of Succession Act, the bequest made to **Esther Wangare Wanjohi** (now deceased) do revert to the estate and the life interest be deemed to have determined and the contingent heirs that is **David Kigome Wanjohi** and **Phylis Wanjiru Kigome** be equal beneficial owners in respect of the landed properties and one **Jane Gathoni Wanjohi** in respect of motor vehicle registration No. KWJ 005 and the Certificate of Confirmation be accordingly amended.

(v) That the names of the deceased **Esther Wangare Wanjohi** (deceased) be deleted from the Grant and consequently the Certificate of confirmation of grant be amended accordingly.

(vi) That **Esther Malel**, the administrator of the estate of **Priscilla Chepkering Malel** either directly or through her advocates M/s Terer and Company Advocates do avail and deposit in Court the Certificate of title (Title Deed) over Land parcel No. Langas Block I (Malel) 43 pending the hearing of this application and thereafter full administration of this estate.

There is a supporting affidavit of **Jane Gathoni Wanjohi**, in which she has deponed, *inter alia*, that the respondents (presumably those seeking to substitute the deceased petitioner) have literally taken over the houses of the estate and collect rent therefrom; that somehow, a parcel of land in Pioneer/Langas Block Malel and Motor Vehicle registration number KWJ 005 were transferred to the deceased petitioner; that the original title of Pioneer/Langas I (Malel) 43 is still in the possession of the advocates of the estate of the late **Priscilla Malel**, the former owner, and that the transfers of the said land and motor vehicle were fraudulent.

The surviving petitioners have introduced to the proceedings, **Charles Kamonjo** T/A Rufa Commercial Agencies who they describe as an Interested Party.

The surviving petitioners' application is opposed by **Samuel Kamau Mwangi**, one of the applicant's intending to substitute the deceased petitioner. He has filed a replying affidavit in that regard. The interested party has also opposed the application and he too has filed a replying affidavit. **Mr. Mwangi**, has opposed the application on the basis, *inter alia*, that he is a dependent of the late 1st petitioner who had her own separate estate comprising:-

- (i) Parcel No. Pioneer/Langas/Block I (Malel) 43,
- (ii) Unregistered plot at Relax-Inn Langas measuring ¼ of an acre,
- (iii) Motor Vehicle Registration No. KWJ 005

(iv) Plot at Rivatex – Cherunya, Plot at Hill School and Plot at Mariakani Mombasa;

and that the surviving petitioners' application is tainted with malice and falsehoods and is an abuse of the process of the court.

The Interested Party has deponed, *inter alia*, that he has not been joined to these proceedings and is in no way concerned with the estate of the deceased **Joseph Wanjohi Kigome**; that he was appointed by the deceased Petitioner, as her agent, for the purpose of collecting rent in respect of Pioneer/Langas/43 which property is in her name and after her death, a limited grant of representation was issued to the intended substitutes.

When the applications came up before me for hearing, counsel agreed to file written submissions which were in place by 30th May, 2011. The submissions reiterated the parties' stand-points taken in their respective affidavits. I have considered the applications, the affidavits filed and the submissions of counsel. I have also given due consideration to the authorities cited by counsel. Having done so, I take the following view of the matter. I think it is appropriate to first consider whether **Francis Kinyanjui Mwangi** and **Samuel Kamau Mwangi** should be appointed administrators of the estate of the late **Joseph Wanjohi Kigome** in place of **Esther Wangare Wanjohi** who died on 9th March, 2011. The application is predicated on the main ground that when the said petitioner died, the mode of distribution of the assets of the estate of the deceased **Joseph Wanjohi Kigome** had not been concluded and that the deceased petitioner's property which she had acquired during her life was inadvertently included as an asset of the estate of her husband, the late **Joseph Wanjohi Kigome**. In the applicant's view, they, as brother and nephew of the deceased petitioner respectively, are entitled to be appointed administrators to replace the deceased petitioner.

The Law with regard to who ranks in priority to administer a deceased's estate is the Law of Succession Act (Cap 160 Laws of Kenya). The two applicants acknowledge that the deceased **Joseph Wanjohi Kigome** died testate. The Will was annexed to the original petition for probate which petition was lodged by the deceased petitioner and the surviving petitioners. The Will does not identify an administrator. Therefore, the provisions of sections 53 and 63 of the said Act apply. The deceased was survived by the deceased petitioner, the surviving petitioners and **David Kigome Wanjohi**. They obviously ranked in priority to the two applicants **Francis Kinyanjui Mwangi** and **Samuel Kamau Mwangi**. The demise of the 1st Petitioner did not create a gap in the administration of the deceased's estate. The surviving petitioners have, in my view, capacity to administer the estate of **Joseph Wanjohi Kigome**.

The estate of **Joseph Wanjohi Kigome** is separate from the estate of the deceased petitioner. The applicants have contended that they were dependants of the petitioner who had her own property. That may very well be the case. It is not however, her estate which is the subject of this cause and the attempt to administer her estate through this cause is, in my view, misconceived. The applicants, **Francis Kinyanjui Mwangi** and **Samuel Kamau Mwangi** are at liberty to apply for a Grant of Representation to the estate of **Esther Wangare Wanjohi**, the deceased petitioner. Their application to substitute her in this cause is without merit and is dismissed.

I turn now to the surviving petitioners' application dated 31st March, 2011. The same seeks various orders against the applicants in the 1st application and Charles **Kamonjo**, described as the Interested Party. Another order is also sought against the Administratrix of the estate of **Priscilla Chepkering Malel**. The interested party is introduced for the 1st time in these proceedings by the surviving Petitioners. They have done so without seeking leave of the court. The administratrix of the estate of **Priscilla Chepkering Malel** has also been introduced for the first time to these proceedings by the same surviving petitioners without the leave of the court. She is not even described as an Interested Party and it is not even indicated that she should be served. Yet, orders are sought against her. That, in my view, is irregular. In the premises, orders sought in prayers 6 and 9 of the application are declined.

Prayers 3, 4, 5 and 7 may be considered together. Orders in terms of the said prayers are sought

subject to the Certificate of Confirmation, whatever that means. Prayer 3 seeks a preservative order in respect of the following properties:-

- (a) Elburgon /Arimi/Ndoshwa Block 4/495 (Nyakambi)
- (b) Pioneer/Langas Block I Malel 182
- (c) Un-registered ¼ plot in Relax-Inn Langas
- (d) Motor vehicle registration No. KWJ 005
- (e) Land Parcel No. Pioneer/Langas block I (Malel) 43.

I have not seen the registration particulars of (a), (b), and (c) above. I am not therefore in a position to say, with certainty, what the deceased's interest in the properties was as at the time of his demise. With regard to (e), Land Parcel No. Pioneer/Langas Block I (Malel)43, the surviving petitioners have exhibited a copy of the Certificate of Official Search dated 7th February, 2011. It indicates that as on 2nd July, 2010, the said Title was registered in the names of the deceased petitioner. The title was however mentioned as belonging to the deceased herein in the documents filed in support of the application for a Grant of Probate to his estate. However, evidence of registration in the deceased's name was not exhibited. Indeed the last Will of the deceased did not specifically identify the said title. In those premises, the orders sought in respect of the same are not available to the surviving petitioners in these proceedings. The surviving petitioners, as the administrators of the deceased's estate, are at liberty to commence recovery proceedings against the personal representatives of the estate of the deceased petitioner.

With respect to motor vehicle registration number KWJ 005, the surviving petitioners have exhibited annexure JWG 6(b). It indicates that the deceased petitioner is the registered proprietor. The exhibit does not reflect that the deceased herein ever had an interest in the said motor vehicle even though it was indicated as an asset of the estate of the deceased when these proceedings were instituted. The vehicle is therefore in the same category as parcel No. Pioneer/Langas B/I/Malel/43. The surviving petitioners, as the administrators of the estate of the deceased, are at liberty to commence recovery proceedings in respect of the same.

For the same reasons, orders sought in prayers 5 and 7 are not available to the surviving petitioners.

What remains to be considered is prayer 8 and the issue of costs. In prayer 8, the surviving petitioners seek that the name of the deceased petitioner **Esther Wangare Wanjohi**, be deleted from the grant and the certificate of confirmation of grant be amended accordingly. Having declined the application of **Francis Kinyanjui Mwangi** and **Samwel Kamau Mwangi**, there is no other impediment in allowing prayer 8 of the surviving petitioners' application. An order is therefore issued in terms of prayer 8.

With regard to costs, the order that commends itself to me is that each party shall bear his/her own costs.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF JUNE, 2011.

F. AZANGALALA
JUDGE.

Read in the presence of:-

1. Mr. **Magare** for the Petitioners
2. Mr. **Oribo** holding brief for **Mr. Nabasenge** for the Interested Party.

F. AZANGALALA
JUDGE.
27/6/2011.